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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 1131

CAPITOL AIRWAYS, INC.,
Original Petitioner and Respondent,

v.

THE AIRLINE PILOTS ASSOCIATION, INTERNATIONAL,
Cross-Petitioner and Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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Cross-Petitioner and Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable The Justices of the Supreme Court of the United States:

Cross-Petitioner, Air Line Pilots Association, International (hereinafter referred to as "ALPA"), prays that a writ of Certiorari issue to review a part of the decree of the Sixth Circuit Court of Appeals filed on February 10, 1965.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Sixth Circuit is reported unofficially in 56 LRRM 2404, and is copied in full in the Appendix hereto.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

The District Court is given jurisdiction under Sections 1337 and 2201 of Title 28, U. S. C.

STATUTES INVOLVED.

Title 45, U. S. C., Sections 151-188, are the applicable statutes. Section 181 makes all of the earlier sections of the Railway Labor Act applicable to air carriers except Section 153.

QUESTION PRESENTED.

May a Federal Court refuse to enforce an arbitration award based on the Court's view that the aggrieved employee should proceed by private damage action for breach of contract, rather than under the collective bargaining agreement when such agreement both substantively and procedurally permits of a contrary construction and the arbitration panel so found?

STATEMENT OF THE CASE.

The Respondent and Original Petitioner, Capitol Airways, Inc. (hereinafter referred to as "Capitol"), filed a petition for certiorari to review a portion of the order and decree of the Sixth Circuit Court of Appeals in Case No. 1031, October Term, 1964. ALPA filed a brief in opposition, and now files its cross-petition for certiorari seeking to reverse that portion of the judgment of the Court of Appeals for the Sixth Circuit that failed to order compliance with an arbitration award in favor of **Captain John K. Riley**. The decision of the Court of Appeals for the Sixth Circuit sustained the District Court in enforcing

the arbitration awards of the Board in the **Hull** and **Gerhart awards**, reversed the District Court in the **Carlin award**, and ordered enforcement, but failed to reverse the District Court and order enforcement of the **Riley award**. The District Court had jurisdiction under Section 1337, Title 28, U. S. C.

Respondent is an air carrier operating pursuant to authority conferred by the Civil Aeronautics Board; and is a Tennessee corporation with principal offices in Nashville, Davidson County, Tennessee.

Petitioner (Cross-Petitioner) ALPA, is an unincorporated association organized for the purpose and objects of a labor union, with offices in Chicago, Illinois.

Capitol employs a substantial number of Air Line Pilots, and the terms and conditions of employment are set forth in a collective bargaining agreement (R., 3a, 4a).

The collective bargaining agreement provides for the submission of disputes, grievances and other matters for adjudication and final settlement to an arbitration panel. This arbitration panel is known as the System Board of Adjustment (hereinafter referred to as "Board"), and was established by agreement between Capitol and ALPA pursuant to a mandate in the Railway Labor Act (R., 4a).

Certain grievances arose and were submitted in accordance with procedures contained in the collective bargaining agreement resulting in awards by the Board in favor of grievants R. N. Hull, J. L. Carlin, Robert M. Gerhard, and John K. Riley. Capitol refused to comply with the awards of the Board (R., 5a, 6a).

District Court action was initiated by Capitol and a counterclaim filed by ALPA requesting enforcement of the awards (R., 85a-87a). Motions for summary judgment were made and rulings had thereon by the District Court,

resulting in an appeal and cross-appeal to the Sixth Circuit (R., 151a-163a).

The Board awards are briefly summarized below:

Riley Award.

The Award shows that Captain Riley was put on the Capitol roster and seniority list of September 7, 1961, as number 110. The Board found that Riley was a furloughed employee; that a letter of recall was sent him on October 13, 1961; and that he accepted said recall. In reporting for work with Capitol, Riley was forced to quit a job with Riddle Airlines in Oklahoma City (R. 80a, 81a). The Board Award stated in part:

> "However, since the records show that Captain Riley is still carried on the Capitol Airways list as a furloughed employee, it must be admitted that Capitol Airways, Inc., must at least in a measure recognize him as an employee since he has not been dropped from the records" (R. 84a).

The Board awarded Captain Riley $4,800.00 to compensate him, in part, for Capitol's refusal to pay his salary after he accepted the recall and reported for duty (R. 84a).

Hull Award.

In the Hull Award, the discharge by Capitol was based on the Operations Manual, which allegedly provides that a crew member can be discharged for smuggling. The Board Award shows that while Captain Hull was in Frankfort, he purchased two musical instruments. On arrival in this country, Hull asked a Stewardess to list these instruments on her declaration and she agreed to do so. Subsequently, the customs officials cleared the

instruments and the Stewardess paid the duty on them (R. 59a, 63a-65a).

The Board noted that Hull was Chairman of the Grievance Committee; that he was not guilty of smuggling since the customs duty had been paid; that the sort of activity complained of was done openly and often (R. 68a, 75a); and as to Capitol's allegations of misconduct, the arbitrator stated:

> "Now I hope these gentlemen don't believe that I can accept such unadulterated claptrap" (R. 74a).

The Board found that Capitol had not attempted to discipline the Stewardess for her part in the episode (R. 75a); and decreed that Hull was to be returned to work. In finding that Hull was not guilty of smuggling, the Board stated:

> "In fact, so much of this is done, and done openly, that the Customs Bureau even has a place on its form to instruct crew members about listing items carried by 'you as an accommodation for others'" (R. 72a).

Gerhard Award.

Gerhard was discharged by Capitol for allegedly refusing to fly a ferry flight. The award of the Board states that there had been "errors", not misconduct, on both sides. The Board found: that Capitol violated the Collective Bargaining Agreement by failing to provide Gerhard with a copy thereof, and by not posting a current seniority list at the station; that both Gerhard and Capitol had an obligation to prevent the Pilot from exceeding h. allowable hours for flying during a month; and that Capitol failed to have a proper official available to decide whether Gerhard would exceed his maximum flying hours by undertaking the flight in question. In exonerating Gerhard, the Board stated:

"Gerhard is responsible for his errors, but he is not responsible for those on the part of the company . . ."

"Section 22 of the Agreement gives the company the **right to discharge for justifiable cause.** In this case, the neutral umpire does not consider the cause for discharge as justifiable" (emphasis added).

The Board directed that Gerhard be reinstated (R. 80a). (Due to an error the complete "Gerhard Award" is not printed in the Joint Appendix. However, the complete award is contained in Exhibit D to the Original Complaint, and the Court is respectfully referred thereto.)

Carlin Award.

The Award in the Carlin case indicated that he was discharged for writing certain letters of protest to Capitol officials concerning terms and conditions of employment. The Board found that the matter was properly before it; that said Board should hear the dispute because the letter of May 3 gave the Board jurisdiction; that the actions on the part of Capitol amounted to condoning the actions of Captain Carlin; and that Captain Carlin should be reinstated without back pay (R. 77a-79a).

REASONS FOR GRANTING THE WRIT.

The judgment of the Court of Appeals for the Sixth Circuit in refusing to order the enforcement of the **Riley award** constitutes a decision of ". . . federal questions in a way in conflict with applicable decisions of this Court; . . ." (See Rule 19, 1 (b)).

ARGUMENT.

The Board found and the record supports such finding, both substantively and procedurally, that Riley was a part of the appropriate unit, was governed by the col-

lective bargaining agreement, and possessed rights arising therefrom. Therefore, the decision of the District Court and of the Sixth Circuit Court of Appeals in refusing to enforce the **Riley award,** is in direct conflict with **Republic Steel Corp. v. Maddox,** ... U. S. ..., 13 L. ed. 2d 580 (No. 43, Jan. 25, 1965); **Wiley & Sons v. Livingston,** 376 U. S. 543, 11 L. ed. 2d 898, 84 S. Ct. 909 (Mar. 30, 1964); and **International Association of Machinists, AFL-CIO, et al. v. Central Airlines,** 372 U. S. 682, 10 L. ed. 2d 67, 83 S. Ct. 956.

CONCLUSION.

For the reason that there is no basis in law for the refusal by the Sixth Circuit Court of Appeals to enforce the Riley Award, this Petition for a limited writ of certiorari should be granted, and the Sixth Circuit Court of Appeals reversed insofar as it refused to order enforcement of the **Riley award.**

Respectfully submitted,

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Of Counsel.

Certificate of Service.

I hereby certify as attorney of record for the Air Line Pilots Association, International, in the above styled and

numbered cause in this Court, that I have this date had mailed by air mail, postage prepaid, to Judson Harwood, Esquire, Nashville Bank & Trust Building, Nashville, Tennessee, attorney of record for Original Petitioner and Cross-Respondent, at his said proper post office address, two copies of this cross-petition for writ of certiorari.

This 4th day of May, 1965.

Cecil D. Branstetter,
216 Third Avenue North,
Nashville, Tennessee.

APPENDIX.

Nos. 15660-1.

United States Court of Appeals
For the Sixth Circuit.

Capitol Airways, Inc.,
Plaintiff-Appellant,

v.

The Airline Pilots Association, International,
Defendant-Appellee.

Capitol Airways, Inc.,
Plaintiff-Cross-Appellee,

v.

The Airlines Pilots Association, International,
Defendant-Cross-Appellant.

On Appeal from the United States District Court, for the Middle District of Tennessee.

Decided February 10, 1965.

Before: Weick, Chief Judge, Cecil, Circuit Judge, and Taylor, District Judge.

Per Curiam. These appeals arise out of the adjudication of an action for declaratory judgment (Title 28, Section 2201, U. S. C.) brought in the United States District Court for the Middle District of Tennessee, Nashville Division, by Capitol Airways, Inc., plaintiff, against The Airline Pilots Association, International, defendant. The parties

will be referred to as Capitol and ALPA, respectively. Capitol brought the action in the District Court for a declaration that four awards, in favor of grievants, Riley, Hull, Gerhard and Carlin, and against Capitol, made by The Capitol Airways System Board of Adjustment (referred to herein as Board) were invalid. The court on motions for summary judgment sustained the awards as to Hull and Gerhard and held the awards in favor of Riley and Carlin invalid. Capitol appealed from the adverse ruling on the Hull and Gerhard awards, and ALPA filed a cross-appeal from the adverse ruling to it on the Carlin and Riley awards.

The opinion of William E. Miller, the trial judge, is reported at ... F. Supp. .... We agree with his conclusions as to the Riley, Hull and Gerhard awards. Capitol argues that the trial judge did not make a de novo interpretation of the contract. In our opinion, the arbitration clause of the collective bargaining agreement was susceptible of the interpretation placed upon it by the Board and the district judge was right in sustaining the Board. We affirm the judgment of the District Court on these three awards on the opinion of District Judge Miller.

The Carlin award presented a procedural question: Was the issue of Carlin's dismissal properly before the Board? On May 3, 1962, a letter was sent to the Board on behalf of Carlin in which it was requested to determine three things: 1. "That the Company was in violation of the Employment Agreement." 2. "That the grieving pilot be compensated for all losses monetary or other sustained by him in consequence of the alleged wrongful action of the Company." 3. "That the grievant have such other further or different relief as to the Board may be deemed just and proper." On November 6, 1962, another letter was sent to the Board on behalf of Carlin with an additional request for relief: "That the grievant be reinstated with back pay and all attendant rights."

The Board found that the letter of November 6th was not timely filed and could not be given consideration. It held further that the matter in controversy was properly before it and that it had jurisdiction to hear the dispute and the appeal. The Board found that Carlin's discharge was justified but that the penalty was too severe. He should have been suspended for a period of time instead of a complete discharge. The award of the Board provided that Carlin be reinstated with no pay for time lost and that he was entitled to his seniority rights and their attendant privileges.

The district judge held that the question of discharge was not properly before the Board for the reason that the letter of November 6th was not timely filed. For this reason he held that the award was invalid.

The Court has held that procedural questions are to be determined by the arbitrator rather than the Court. **Avco Corp. Electronics & Ordnance Div. v. Mitchell**, 336 F. 2d 289; **Local 748, etc. v. Jefferson City Cabinet Co.**, 314 F. 2d 192, cert. den., 377 U. S. 904. The judgment of the District Court as to the Carlin award is reversed and the case remanded for further proceedings consistent with this opinion.